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Appealability Problems in Nebraska; Advantages of Federal Rule 54(b)

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Comment

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I. INTRODUCTION

In *Green v. Village of Terrytown*,[1] the plaintiff sued three defendants, the Village of Terrytown and two of its employees. On December 31, 1971, the court entered summary judgment in favor of the defendant Village of Terrytown. On January 10, 1972, the plaintiff filed a motion for new trial as to that December 31 order. The motion was denied on January 31, 1972. On March 20, 1972, summary judgment was entered in favor of the two individual defendants. On March 29, 1972, the plaintiff filed a motion for new trial as to all defendants. That motion was denied, and on April 27, 1972, the plaintiff filed a notice of appeal as to all three defendants.[2] The Supreme Court of Nebraska held that the dismissal on December 31, 1971, of the defendant Village of Terrytown was a final and appealable order and that the failure to complete an appeal within the time required by statute necessitated a dismissal of the appeal as to that defendant.[3]

The *Green* case presented to the Supreme Court of Nebraska for the first time the issue of the appealability of a judgment

1. 188 Neb. 840, 199 N.W.2d 610 (1972).
2. Brief for Appellant at 1-2, Green v. Village of Terrytown, 188 Neb. 840, 199 N.W.2d 610 (1972).
3. 188 Neb. at 842, 199 N.W.2d at 611. NEB. REV. STAT. § 25-1912 (Reissue 1964) provides for appeals to the Supreme Court of Nebraska from a district court:

> The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree or final order was rendered, within one month after the rendition of such judgment or decree, or the making of such final order, or within one month from the overruling of a motion for a new trial in said cause, a notice of intention to prosecute such appeal . . . and . . . by depositing with the clerk of the district court the docket fee required by law in appeals to the Supreme Court.

which dismisses one or more but fewer than all of the parties to an action and which leaves the action pending as to the remaining parties. This article will analyze the various rules that the state courts and the federal courts, prior to the Federal Rules of Civil Procedure, have adopted to deal with this issue. Rule 54(b) of the Federal Rules of Civil Procedure also will be discussed in terms of its modification of the federal rules and its advantages over the state court rules. In conclusion, this article will recommend the adoption of Rule 54(b) in Nebraska.

II. SINGLE JUDICIAL UNIT THEORY

At the early common law an action was a single judicial unit even though it contained multiple claims or multiple parties. A judgment could be appealed only as a single judicial unit. The general rule, therefore, was that an appeal would not lie to bring up a judgment that had not completely disposed of the action.[4] In other words, it must dispose of all the issues as to all the parties. *Metcalf's Case*[5] was an early statement of the single judicial unit theory:

> [I]f the record should be removed till (before) the whole matter is determined, there would be a failure of right; for the Judges of the King's Bench cannot proceed upon the matter which is not determined, and upon which no judgment is given; and the whole record ought to be either in the Common Pleas or in the King's Bench; also the original is entire, and cannot be there and here likewise.[6]

There are only a very small number of state courts that continue strictly to apply the single judicial unit theory when it comes to the multiple party case.[7] In those states following the strict doctrine, an order is interlocutory, and hence not appealable if it does not dispose of the case as to all the parties.[8] In *Green* had the

4. 6 J. MOORE, FEDERAL PRACTICE ¶ 54.19, at 211 (2d ed. 1972) [hereinafter cited as MOORE]. At the time of its inception, the single judicial unit rule may have been sound. As a practical matter, difficulty in preparing and transmitting judicial records supported the rule. Furthermore, the limited joinder of parties and issues and the jealousy that existed between the common law courts explain the reasons for the rule.
5. 77 Eng. Rep. 1193 (K.B. 1615).
6. *Id.* at 1196.
7. Some recent cases which have applied the single judicial unit rule are: Dudeck v. Ellis, 376 S.W.2d 197 (Mo. 1964); McDaniel v. Lovelace, 392 S.W.2d 422 (Mo. App. 1965); *In re* Old Colony Coal Co., 49 N.J. Super 117, 139 A.2d 302 (1958); Martin v. City of Ashland, 233 Ore. 512, 378 P.2d 711 (1963); First Nat'l Bank v. Noble, 179 Ore. 26, 168 P.2d 354 (1946); Potter v. Sanderson, 199 Tenn. 337, 286 S.W.2d 873 (1956).
8. In McDaniel v. Lovelace, 392 S.W.2d 422 (Mo. App. 1965), the court

single judicial unit rule been applied, the dismissal of the Village would not have been final and appealable because the action was left pending against the two individual defendants.

III. EXCEPTION TO SINGLE JUDICIAL UNIT THEORY

In the federal courts, prior to the adoption of the Federal Rules of Civil Procedure, the exceptions to the single judicial unit rule in multiple party cases were well defined.

A judgment was final where it terminated the action as to one or more but fewer than all of the defendants unless the alleged liability was joint. The leading federal case was *Hohorst v. Hamburg-American Packet Co.*[9] Hohorst brought an acton against the Hamburg Company and several individual defendants for patent infringements. The company was dismissed from the action because the court had no personal jurisdiction over it. Hohorst appealed from the dismissal. Hohorst's appeal was dismissed because the alleged liability of the defendants was joint. All the defendants had cooperated and participated in the acts of infringement. Therefore, there could be no appeal until a judgment disposed of the case as to all parties.[10]

In the context of determining whether an order as to one of several defendants was final and appealable, "joint liability" had a much broader meaning than the technical definition.[11] Technically, joint liability is a common liability incurred by two or more persons, in which the obligors bind themselves as a unit but not severally. Suit on a joint liability must be prosecuted in a single action against the obligors. The *Hohorst* doctrine of nonfinality extended not only to the cases where the defendants were truly jointly liable but also to cases where some of the defendants were secondarily liable or to cases where the liability of the defendants arose out of the same set of facts and was interrelated.[12]

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very succinctly stated the rule:

> The motion [to dismiss the appeal] must be sustained for the reason that the order appealed from was not a final judgment for the purpose of appeal, since it did not dispose of the case as to all the parties.

Id. at 426.

9. 148 U.S. 262 (1893).
10. *Id.* at 265-66.
11. 6 MOORE, *supra* note 4, at ¶ 54.23(4), at 257.
12. *Id.* at ¶ 54.19, at 213. In the *Hohorst* case itself, one of the defendants was only secondarily liable. Another secondary liability case was Oneida Nav. Corp. v. W. & S. Job & Co., 252 U.S. 521 (1920). The *Hohorst* doctrine was applied because the alleged liability of the several defendants arose out of closely related circumstances in Bank of Rondout v. Smith, 156 U.S. 330 (1895), and Moss v. Kansas City Life Ins. Co., 96 F.2d 108 (8th Cir. 1938).

The corollary to the rule of non-finality in the joint liability cases was that an order final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. The rule was succinctly stated in *Republic of China v. American Express Co.*:[13]

> [The Hohorst doctrine of non-finality] applies where the dismissal is of a party or parties jointly charged, or jointly claiming, with other parties who are not dismissed; but there is no doctrine that finality is lacking in an order simply and solely because it dismisses less than all the parties. Where "jointness," in some form, is absent, the test in multiple party cases is whether the order terminates the suit "as a severable matter," or a "distinct matter," with respect to the party dismissed.[14]

The rule stated in the *American Express Co.* case which will be referred to as the "joint liability test," is found in nearly all state court cases on this issue.[15] However, the extent to which some of these courts are in reality applying the old single judicial unit rule while paying only lip service to the joint liability test is not clear.[16] In *Bradley v. Holmes*,[17] for example, the court stated:

> Since a judgment is not final which settles a case as to a part only of the defendants, an order which dismisses the suit as to a part

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13. 190 F.2d 334 (2d Cir. 1951).
14. *Id.* at 335-36.
15. *See* Beavers v. Beavers, 55 Ariz. 122, 99 P.2d 95 (1940); Reuter v. City of Oskaloosa, 253 Iowa 768, 113 N.W.2d 716 (1962); Vincent v. Plecker, 319 Mass. 560, 67 N.E.2d 145 (1946); Bradley v. Holmes, 242 Miss. 247, 134 So. 2d 494 (1961); Pan American Petroleum Corp v. Texas Pac. C. & O. Co., 320 S.W.2d 915 (Tex. Civ. App. 1959); Attorney General of Utah v. Pomeroy, 93 Utah 426, 73 P.2d 1277 (1937). Wells v. Whitaker, 207 Va. 616, 151 S.E.2d 422 (1966); Bowles v. City of Richmond, 147 Va. 720, 129 S.E. 489, *aff'd on rehearing*, 147 Va. 729, 133 S.E. 593 (1926).

    The rule is stated in Vincent v. Plecker, 319 Mass. 560, 565, 67 N.E.2d 145, 148:

    > [W]here the liability of one defendant is not dependent upon or intertwined with that of another, but is independent, a decree dismissing the bill as against him is a final decree determinative of the separable controversy between him and the plaintiff, and is appealable as such.

16. There are several cases which do no more than quote the rule set out in the text corresponding to note 18 *infra*. It is highly questionable whether these courts understand the reference to "joint liability" in the quoted rule. If they do understand it, there is generally no attempt in these cases to apply the joint liability test. The result in these cases is that the order is found to be interlocutory because the order does not dispose of all the issues as to all the parties. *See, e.g.*, Reuter v. City of Oskaloosa, 253 Iowa 768, 113 N.W.2d 716 (1962); Bradley v. Holmes, 242 Miss. 247, 134 So. 2d 494 (1961); Pan American Petroleum Corp. v. Texas Pac. C. & O. Co., 320 S.W.2d 916 (Tex. Civ. App. 1959).
17. 242 Miss. 247, 134 So. 2d 494 (1961).

> only of them, *all of whom are charged to be jointly liable,* is not a final judgment from which an appeal will lie, while the case remains undisposed of in the lower court as to the other defenddants . . . .[18]

There was no further indication from the court whether the order was not final because it dismissed only part of the defendants or because it dismissed only part of the defendants all of whom were jointly charged. There was no attempt by the court to define what was meant by "jointly liable;" moreover, the court did not determine the nature of the liability on the part of the various defendants.[19] Absent a determination of whether "jointness" in some form is present, it cannot be said that the joint liability test was applied.

Even those courts that do attempt to apply the joint liability test have not been consistent because of the difficulty of determining when the defendants are "jointly charged." As was noted above, the federal courts extended the concept of "jointness" beyond joint liability in its technical sense. This same nebulous concept of jointness was carried over into state court cases. In *Vincent v. Plecker,*[20] the test of jointness was met if the liability of one defendant was "dependent upon or intertwined" with that of another. The liability of one defendant was separate and distinct if it was "independent" of the other's liability.[21]

Perhaps the most cogent discussion of the distinction between separate and joint interests for purposes of determining the appealability of an order dismissing fewer than all the defendants is found in *Attorney General of Utah v. Pomeroy.*[22]

> [T]he judgment is severable when the original determination of those issues by the trial court and reflected in the judgment

18. *Id.* at 250, 134 So. 2d at 495 (emphasis added).
19. The *Bradley* court stated that a narrow exception to this rule exists where a decree dismisses one or more of a larger number of defendants whose interests are not all connected with the other. The *Bradley* case was a wrongful death action arising out of an automobile collision against an employee and his employer. The circuit court dismissed the suit as to the employer and ordered a new trial as to the employee. The Supreme Court of Mississippi held that the judgment was not a final order and plaintiff's appeal was premature. The court simply stated that the case was not within the narrow exception. In Nebraska, under Dickey v. Meier, 188 Neb. 420, 197 N.W.2d 385 (1972), in an action against an employer and his employee for the negligent acts of the employee, the employer has only secondary or derivative liability. Secondary liability has generally been held to satisfy the test of "jointness" as it is contemplated by the joint liability test.
20. 319 Mass. 560, 67 N.E.2d 145 (1946).
21. *See* the quotation from Vincent v. Plecker, 319 Mass. 560, 67 N.E.2d 145 (1946), note 15 *supra.*
22. 93 Utah 426, 73 P.2d 1277 (1937).

> or any determination which could be made as the result of an appeal cannot affect the determination of the remaining issues of the suit, nor can the determination of such remaining issues affect the issues between plaintiff and the dismissed defendants if such defendants are restored to the case by a reversal.
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> It seems to us that, unless the term "identity of interest," is defined, it does not aid much as a test, but that the test rather is whether the determination of the issues as to any defendant depends on or affects the determination of the issues as to the other defendants . . . . If the claimed basis of liability of the dismissed defendants is connected with or so related to the claimed basis of liability of the remaining defendants so that one may affect the other, a judgment as to the discharged defendants is not appealable until the issues as to the remaining defendants are settled.[23]

IV. RULE OF *GREEN v. VILLAGE OF TERRYTOWN*

The third alternative, in addition to the single judicial unit rule and the joint liability test, is the rule announced in *Green*, *i.e.*, that the dismissal of one of several parties to an action is always a final and appealable order. There are five states, including Nebraska which have cases applying this third alternative.[24] There is no discussion in the texts or by commentators on any such rule. Similarly, the cases themselves are silent as to the rationale behind the rule. Historically, the law has always been opposed to piecemeal appeals, and the single judicial unit rule announced in *Metcalf's Case*[25] is a strong statement of that policy. The joint liability test was adopted by the federal courts to avoid the inflexibility of the single judicial unit rule but it only allowed appeal in cases where the order dismissed the action as a distinct or independent matter with respect to the dismissed party. The Supreme Court of Nebraska in *Green* ignored this authority and phrased the issue as if there were only two choices—either an order affecting one or more of several parties to an action is always final or it is never final.[26]

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23. *Id.* at 462-63, 73 P.2d at 1294.
24. Schneider v. Manheimer, 170 So. 2d 75 (Fla. App. 1964); Ritter v. Perma-Stone Co. 326 P.2d 442 (Okla. 1958); Adams v. Allstate Ins. Co., 58 Wash. 2d 659, 364 P.2d 804 (1961); Newberger v. Pokrass, 27 Wis. 2d 405, 134 N.W.2d 495 (1965).
25. 77 Eng. Rep. 1193, 1196 (K.B. 1615). *See* text accompanying note 6 *supra*.
26. The supreme court cited several cases in the *Green* opinion, none of which were supplied to it by the opposing parties in their respective briefs. The cases which the opinion cited as holding that the dismissal as to one party is appealable are all cases very much like *Green*. That is, none of the cases gives an analysis of why the order should or should not be appealable; they simply state, in a very abbreviated fashion, that the order is appealable.

V. ANALYSIS OF THREE ALTERNATIVE RULES

Three alternative rules have been presented thus far, and it may be helpful at this point to place them in perspective. The single judicial unit rule and the rule of *Green*, referred to hereinafter as the "Nebraska rule," are absolute rules. Under the single judicial unit rule, an order is never appealable until the entire case is disposed as to all the issues and all the parties. The Nebraska rule is equally absolute in holding that the dismissal of one or more but fewer than all of the parties to an action is *always* a final and appealable order. The joint liability test lies between these two extremes.

An analysis of the three alternative rules must begin with a consideration of the policy to be furthered or protected. The *Green* court stated the major competing considerations in determining the effect of multiple parties on the finality and appealability of an order.[27] There is a strong historical policy against piecemeal or successive appeals of only parts of cases where the entire action could and should be viewed together. On the other hand, it may be years before the dismissed party knows whether the litigation is really final as to him, unless his status is settled by an immediate appeal. In other words there is a concern for inconvenience and hardship caused by a delay in appealing the order.

Two of the cases which the court cited as holding that the order was not appealable had no applicability because they were decided under state statutes exactly like Federal Rule 54(b). Those cases were Linkous v. Darch, 299 S.W.2d 120 (Ky. App. 1957), and Wilmurth v. State, 79 Nev. 490, 387 P.2d 251 (1963).

Dudeck v. Ellis, 376 S.W.2d 197 (Mo. 1964); McDaniel v. Lovelace, 392 S.W.2d 422 (Mo. App. 1965); *In re* Old Colony Coal Co., 49 N.J. Super 117, 139 A.2d 302 (1958); Martin v. City of Ashland, 233 Ore. 512, 378 P.2d 711 (1963), are accurately cited for the proposition that a dismissal as to one or more of several parties is not final. The other cases, Reuter v. City of Oskaloosa, 253 Iowa 768, 113 N.W.2d 716 (1962); Bradley v. Holmes, 242 Miss. 247, 134 So. 2d 494 (1961); Pan American Petroleum Corp. v. Texas Pac. C. & O. Co., 320 S.W.2d 916 (Tex. Civ. App. 1959), at least acknowledge the "jointness-severable and distinct" exception to the rule. The opinion states, "These cases apparently held that an order is not final unless it disposes of *all* the issues as to *all* parties." 188 Neb. at 841, 199 N.W.2d at 611. Apparently, the court did not know what these cases held.

27. [A] paramount consideration is to be liberal in permitting appeals, but, on the other hand, that piecemeal or successive appeals are not desirable. It would appear there is a further consideration, namely that where there are multiple defendants and the action is dismissed as to one defendant, that defendant no longer has a voice in the determination of the litigation to drag on for months or years, he has no way of bringing an end to the litigation or ascertaining whether or not it has been finally determined as to him.
188 Neb. at 841, 199 N.W.2d at 611.

The major benefit in adopting either of the two absolute rules is that it would lend a great deal of certainty to the question of appealability. Under the single judicial unit rule, the parties know that an appeal may not be taken until the entire case has been disposed of. No less certain is the mandatory appeal of the dismissal of one of several parties under the Nebraska rule. The value of a rule that can be applied with certainty is not to be understated. It is undesirable to place parties in a position of routinely bringing appeals that are not allowed just to protect themselves against the *possibility* that the order was final and appealable. Similarly, if a plaintiff does not appeal an order dismissing one of several defendants, that should have been appealed, he may lose his only solvent defendant.[28] Certainty is a virtue that should be a part of the rule that is adopted.

However, the certainty of these rules comes at a high cost—either the single judicial unit rule or the Nebraska rule provide certainty at the expense of a well-reasoned approach to the problem. The rules are too absolute and inflexible. If the Nebraska rule is adopted, the court must necessarily determine that in every case the correctness of the order dismissing one or more but fewer than all the parties to an action must be settled immediately. There is no recognition under the Nebraska rule that in some cases there may be a just reason for delay. For example, successive appeals may result in an appellate court re-examining many of the same issues gone over on an earlier appeal; the appellate court may be able to treat the issues more effectively if the case comes to it all at one time rather than piecemeal. The single judicial unit rule, on the other hand, recognizes no instance in which successive appeals may be proper. Neither of these rules does anything to reconcile the competing considerations. The second virtue that the rule should have, and which the two absolute rules cannot provide, is flexibility.

The joint liability test recognizes the validity of the policies behind both the Nebraska rule and the single judicial unit rule and it attempts to balance the two in certain types of cases. The application of this rule can best be demonstrated by discussing a few actual cases.

The facts in *Green* are ideal for an analysis of the joint liability

28. This is probably what happened to the plaintiff in *Green*. The suit was against the Village of Terrytown and two individual workmen for the Village. The Village was dismissed from the action on a summary judgment, and by failing to perfect a timely appeal as to the Village, the plaintiff probably lost the only defendant who would have been capable of satisfying a judgment.

test.[29] The two individual defendants, Bartow and McGuire, were workmen for the Village of Terrytown. Bartow and McGuire did some street repair and to protect the fresh concrete they placed a telephone pole in the street as a barricade.[30] No lights, reflectors or other warnings were placed around the pole. At 10:45 p.m. that same evening, the plaintiff while driving his motorcycle struck the pole and sustained serious injuries.[31] The Village was dismissed from the action on summary judgment because it had not been given notice by the plaintiff within 60 days from the accident, as required by statute.[32]

At the outset, the court stated that the employment relationship between the Village and the individual defendants had not been determined.[33] Under the joint liability test, this statement, in itself, indicates that there was no adequate basis for determining whether the dismissal of the Village was final and appealable. No consideration of the concept of "jointness" was possible. The result as to finality may be substantially different if the two workmen were independent contractors instead of employees.

When the appeal of Bartow and McGuire was decided by the supreme court, they were classified as employees of the Village.[34] The alleged negligent acts of the employees are imputed to the Village and became the negligent acts of the Village. The real dispute in the case was determining who had the duty to warn the public that there was a telephone pole lying in the street—the Village or the two employees. The analysis under the joint liability test would be as follows. If the dismissal of the Village had been

29. When the supreme court decided the motion to dismiss the appeal of the Village of Terrytown, the facts of the accident were not discussed. These facts were discussed in Green v. Village of Terrytown, 189 Neb. 615, 204 N.W.2d 152 (1973), which was the appeal of the dismissal of the two individual defendants on summary judgment.
30. The pole was about 20 feet long, and it extended into the street by at least 12 feet.
31. The accident occurred on May 17, 1967, and the action was filed against the Village of Terrytown on Aug. 26, 1967. By Dec. 31, 1971, the action had proceeded to dismissing the Village on summary judgment.
32. Neb. Laws c. 77, § 1, at 312 (1965), provided:
> No city of the first class, second class or village shall be liable for damages arising from defective streets, alleys, sidewalks, public parks or other public places within such city or village, *unless actual notice in writing* of the accident or injury . . . shall be proved to have been given to the mayor or chairman of the city . . . within sixty days after the occurrence of such accident . . . .

The accident occurred on May 17, 1967, but the Village was not given written notice until Aug. 1, 1967. This statute is no longer in effect.
33. 188 Neb. at 840, 199 N.W.2d at 610.
34. 189 Neb. at 616, 204 N.W.2d at 155.

reversed on the merits,[35] *i.e.*, by a holding that the notice of injury statute had been complied with, would a determination of the issues as between the Village and the plaintiff have had an effect on the determination of the issues, as between the plaintiff and the Village employees? The answer is obvious. The duty was either on the Village or on the employees; wherever it was, the Village was potentially liable. If the duty was on the employees and they were found negligent, the Village was vicariously liable. If the Village had the independent duty to warn, it was potentially liable in its own right. Whatever the determination of the duty and negligence issues, the Village would have been involved in any appeal. When the Village was dismissed from the action, the determination of remaining issues as between the remaining defendants and the plaintiff had a direct effect on the potential liability of the Village. For that reason, under the joint liability test the order of dismissal was not final and appealable as to them.

The Village, in its brief on the motion to dismiss the appeal, argued that because the Village and the two individual defendants had separate defenses, their liabilities were separate and distinct from one another.[36] The Village's defense was the plaintiff's fail-

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35. The plaintiff did have a chance to get a reversal of the order dismissing the Village. Although the Village did not receive written notice of the accident within sixty days of its occurrence, there was evidence to indicate that it had actual notice within one or two days after the accident. Furthermore, there was evidence that the Village's liability insurance carrier investigated the accident within one week after it happened. The question was then presented whether actual notice would satisfy the statute. If actual notice would suffice, there was a question of fact as to whether the Village did have actual notice.

36. The allegations against the Village were that it negligently kept and maintained an obstruction in the street without any light or reflector or other device to warn travelers of the existence of said obstruction. The obligations and duties of each are different. The obligations of workmen were to do what their employer directed. They, as alleged, placed the barricade in the "afternoon." The accident, as alleged, occurred "at about the hour of 10:45 o'clock p.m." The obligation of the Village (if any) was to see that someone (not necessarily Bartow and McGuire) placed proper warnings. After dark, the situation may be different than [sic] in the "afternoon" in May.
The matters were heard separately by separate orders. The dismissal of the action against the Village of Terrytown was not dependent in any way upon whether an action continued to exist against the Defendants, Bartow and McGuire. Dismissal of the action against the Defendants, Bartow and McGuire, did not depend in any way upon continuance of the action against the Village of Terrytown. They were *interdependent and separate.*
Brief for Appellee at 5 (emphasis added). The village cited *Vincent v.*

ure to notify the Village of his injury. The defense of the two individual defendants was that they had no duty to erect a warning. This is not a valid argument under the joint liability test. The true basis for determining the identity or independence of the claims against the defendants is the nature of the alleged liability.

Wells v. Whitaker[37] is a good example of a case where the defenses of the separate defendants were different, but there was still a finding of jointness. *Wells* was an action against an explosives processor (A) and the owner of the land (B) on which the explosives plant had been located. The action was brought by a homeowner to recover damages to his home resulting from an explosion. B's defense was that he was in no way associated with the operation of the explosives plant, and he owed no duty to the plaintiff. B was dismissed from the action prior to trial. The plaintiff's theory was that A and B were joint venturers. If the plaintiff were to secure a reversal of B's dismissal and establish that he was a joint venturer with A, then B would be charged with liability for the same acts or omissions which are the basis of A's liability.[38] The court found that the dismissal of B was not a final and appealable order because A and B were allegedly "jointly liable."

Bowles v. City of Richmond[39] is quite similar to *Green* on the facts, but it demonstrates the application of the joint liability test where an order was held to be final and appealable.

The plaintiff was injured in a car-train collision within the city limits of Richmond. Both the city and the railroad were sued for failing adequately to safeguard the approach of the railroad on Broad Street. The trial court sustained a demurrer of the city and dismissed it from the action on the basis of the plaintiff's failure to file with the city attorney a written statement of the particulars of the accident within six months after its occurrence. The

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Plecker, 319 Mass. 560, 67 N.E.2d 145 (1946), in its Brief. See note 15 *supra*. *Vincent* is really a case supporting the plaintiff's position in this particular case. It is difficult to see how the action against the defendants could be "interdependent" and "separate" at the same time. Generally, when the liabilities of the several defendants are interdependent, jointness is present, and the order is not final and appealable.

Despite a wealth of authority to be found, the plaintiff in its brief, cited no cases on point in favor of its position.

37. 207 Va. 616, 151 S.E.2d 422 (1966).
38. *Id.* at 629, 151 S.E.2d at 432. The decision in the *Wells* case is based on the test of jointness explained in Attorney General of Utah v. Pomeroy, 93 Utah 426, 73 P.2d 1277 (1937).
39. 147 Va. 720, 129 S.E. 489, *aff'd on rehearing*, 147 Va. 729, 133 S.E. 593 (1926).

plaintiff immediately appealed, and the city objected, arguing that the order appealed from was not a final order. The Virginia Supreme Court held that it was a final and appealable order because there was no joint interest between the defendants.[40] If the railroad had been found liable, this would have had no bearing on whether the city did or did not have a potential liability to the plaintiff. The duties, if any, of the two defendants to the plaintiff were not identical. Here, the matter should properly have been finally determined between the city and the plaintiff by a prompt appeal.

The Supreme Court of Nebraska stated that *Green* was a case of first impression in Nebraska.[41] While this was correct, the court has dealt with a closely related issue—whether a judgment against one of several parties in an action may be appealed independently of the others or whether the appeal of one of the judgments brings the whole case up for review.

A representative case is *Sturgis, Cornish & Burn Co. v. Miller.*[42] On May 11, 1900, Sturgis obtained a judgment on a bill of exchange against Hinman as principal and Miller and Helm as sureties. Ten days later Hinman, alone, appealed and the May 11 judgment *as to him* was set aside, and the case set for a new trial. At the new trial, the court found in favor of Hinman and against Sturgis, but it also found in favor of Sturgis against Helm. Judgment was entered against Helm on December 7, 1900, and Hinman was dismissed. Sturgis assigned his December 7 judgment against Helm to the plaintiff. Helm's defense to the action brought against him by the plaintiff was that the judgment of May 11 was not set aside as to him and the trial court had no jurisdiction over him to enter the December 7 judgment. The Supreme Court of Nebraska decided that the May 11 judgment was an entirety and its reversal as to Hinman *ipso facto* set aside the judgment as to Helm and Miller. The rule was stated:

> [A] judgment is not considered an entirety unless the interests of the judgment debtors are inseparable. If the interest of the defendants against whom the judgment of May 11 was rendered was not inseparable, then they were permitted each to prosecute his

40. *Id.* at 725, 129 S.E. at 490. The court stated:
> Until he has dismissed the case as to the joint wrongdoers against whom he has no judgment, or signifies an intention to prosecute the action to judgment against them, as all are jointly liable, there is no final judgment, therefore there could be no appeal. The principle of law above mentioned does not apply to the instant case, as there is no joint interest between the defendants in the matters decided . . . therefore the judgment is final as to the city . . . .

41. 188 Neb. at 840, 199 N.W.2d at 610.

42. 79 Neb. 404, 112 N.W. 595 (1907).

> own defense and present his own theory independently of the other, and procure a new trial of the issues in which he is interested without affecting the liability of his codefendant . . . .
>
> But with inseparable interests, proceedings to vacate by one would carry the entire case with it.[43]

The analogy between this rule[44] and the issue presented in *Green* is found in the rationale behind the rule. If the interests of the several defendants are so intertwined that a decision as to one must necessarily affect the potential liability of the other, there is a need to review the case on an entirety. If the interests of the parties are several and distinct, *i.e.*, they have no effect one on the other, there is no reason why just one party may not appeal.

The joint liability test then has some degree of flexibility. The rule does attempt to distinguish between those cases where the order affecting one or more but fewer than all of the parties to an action should be final and appealable, on the one hand, and those cases where there is a legitimate reason for delay on the other.

The joint liability test, however, is not without its weaknesses. The joint liability test starts with the general proposition that an order dismissing some but not all of several parties to an action is not appealable. The rule then attempts to define those situations where there would be no reason for delaying an appeal of the dismissed party until the entire case is decided. The only situation for which it provides is where the order terminates the action as a separate or distinct matter with respect to the dismissed party. The first basic shortcoming of the joint liability test is that it does not take into consideration *all* of the factors which may be relevant to a determination of whether there is a just reason for delay. The *Green* case is an example of a case where another factor may have come into play. In the above discussion of *Green*, it was determined that under the joint liability test the dismissal of the Village would not have been a final and appealable order. The Village was the only defendant from whom the plaintiff was likely to recover any money. In this situation, the plaintiff should be able to appeal the Village's dismissal immediately. If the dismissal were affirmed on appeal, the plaintiff may decide to save the time and effort involved in pursuing a worthless judgment against the two individual defendants.[45] This determination, of course,

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43. *Id.* at 409, 112 N.W. at 597.
44. A similar rule is stated in Fick v. Herman, 161 Neb. 110, 72 N.W.2d 598 (1955); Polk v. Covell, 43 Neb. 884, 62 N.W. 240 (1895); McHugh v. Smiley, 17 Neb. 626, 24 N.W. 277 (1885).
45. Such a situation was presented in Pabellon v. Grace Line Inc., 191 F.2d 169 (2d Cir. 1951). Several defendants were jointly charged,

would depend on the chances of recovery against the two defendants and how much money was involved. These additional factors that are peculiar to each individual case, but which are relevant to whether there is or is not a reason for delay, are beyond the scope of the joint liability test.

The second shortcoming of the joint liability test is that it is so uncertain and difficult to apply. As has been alluded to before, the concept of "jointness" is not susceptible to a precise definition. It is not even possible to classify types of cases where an order has been held to be appealable or not appealable on the basis of this test. About the most precise statement that can be found is " 'jointness' is present where one of the parties is secondarily or derivatively liable—or where the asserted liabilities of the defendants, one of whom is dismissed, are very closely interrelated."[46] This type of a nebulous standard provides no guidance to a party debating whether to appeal the dismissal of another party to the action. The result is that if a protective appeal is brought in almost every case, many unnecessary appeals will be taken. On the other hand, if a party does not appeal, mistakenly thinking he can meet the jointness standard, he *will* lose the dismissed defendant if the court determines there was no joint liability among the parties and the appeal of the dismissed party should have been taken immediately.

The only possible conclusion to this discussion of the three alternative rules is that none of the three very effectively deals with the problem. There is, however, a workable solution. It is found in Rule 54(b) of the Federal Rules of Civil Procedure.

VI. FEDERAL RULE 54(b)

Rule 54(b) of the Federal Rules of Civil Procedure is the most workable solution to the issue presented in the *Green* case. It provides:

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and previous to trial the one solvent defendant was dismissed. In 1951 the federal courts were operating under the joint liability test so the dismissal could not be appealed—the defendants were jointly charged. The court criticized the joint liability test:

> Being unable to appeal from that order, plaintiff must go through a long, expensive trial, lasting several months, in which he obtains a judgment that is worthless practically, before he can procure a reversal of the order dismissing the solvent defendant, and thus be able to try and to prove his case against that defendant.

Id. at 179.

46. Republic of China v. American Express Co., 190 F.2d 334 n.3 (2d Cir. 1951).

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.[47]

Rule 54(b) basically provides that an order or other form of decision is *not* final if it adjudicates the rights and liabilities of fewer than all the parties in the action *unless* the district court makes (1) an express determination that there is no just reason for delay, and (2) an express direction for the entry of judgment.[48]

A brief history of Rule 54(b) as it developed with regard to the multiple party issue is necessary to understand the present rule. Prior to the adoption of the Federal Rules of Civil Procedure, the joint liability test was used in the federal courts. The original 54(b) adopted in 1938[49] did not apply to multiple parties; it dealt only with the situation where the action involved multiple claims. Rule 54(b) was amended in 1946 to read substantially the same as it does now except that there was no reference to multiple parties.[50] The debate in the federal courts was whether Rule

47. FED. R. CIV. P. 54(b).
48. Feist v. McGee, 433 F.2d 1015 (9th Cir. 1970); Hartford Fire Ins Co. v. Herrold, 434 F.2d 638 (9th Cir. 1970); Donovan v. Hayden, Stone, Inc., 434 F.2d 619 (6th Cir. 1970); Sullivan v. Delaware River Port Authority, 407 F.2d 58 (3d Cir. 1969); Coulter v. Sears Roebuck & Co., 411 F.2d 1189 (5th Cir. 1969); Cram v. Sun Ins. Office, Ltd., 375 F.2d 670 (4th Cir. 1967); United States v. Evans, 365 F.2d 95 (10th Cir. 1966); Fenton v. McCrory Corp., 47 F.R.D. 260 (W.D. Pa. 1969).
49. The original FED. R. CIV. P. 54(b) provided:
> When more than one claim for relief is presented in an action, the court at any stage, upon a determination of the issues material to a particular claim and all counter-claims arising out of the transaction or occurrence which is the subject matter of the claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims. In case a separate judgment is so entered, the court by order may stay its enforcement until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

50. After the 1946 amendment, FED. R. CIV. P. 54(b) provided:
> When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party

54(b), as amended in 1946, should also apply to the multiple party case. A few courts allowed an appeal from a dismissal as to one or more but fewer than all the parties where the trial judge made the requisite finding that there was no just reason for delay.[51] However, beginning with *Steiner v. Twentieth Century-Fox Film Corp.*,[52] the federal courts reversed these earlier decisions, and the accepted rule became that Rule 54(b) did not apply to a case involving multiple parties.[53] Therefore, even after the 1946 amendment to Rule 54(b), the courts were still faced with the troublesome problem of distinguishing between "jointness" and "distinctness." In 1961, Rule 54(b) was again amended to provide specifically for multiple parties.[54]

> claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however, designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all claims.

51. Even though the 1946 version of Rule 54(b) did not specifically mention parties, these courts reasoned that whenever several persons were charged with liability, more than one claim for relief was presented. *See* Pang Tsu Mow v. Republic of China, 225 F.2d 543 (D.C. Cir. 1955); Rao v. Port of New York Authority, 222 F.2d 362 (2d Cir. 1955); Boston Med. Supply Co. v. Lea & Febriger, 195 F.2d 853 (1st Cir. 1952).
52. 220 F.2d 105 (9th Cir. 1955).
53. Steiner v. Twentieth Century-Fox Corp., 220 F.2d 105 (9th Cir. 1955) stated:
> We have answered the question posed by holding that Rule 54(b) means exactly what its words import. The Rule nowhere mentions parties. The Rule is poised on the word *claims*—multiple claims. The word *claims* and the word *parties* mean different things. They are simply dictionary words which do not lose their substance when used in law. As to their basic meaning Black and Webster are in accord. These are not words of art. Parties are not claims.

Id. at 107. After the *Steiner* case, nearly all of the circuit courts reversed their earlier positions and held that Rule 54(b) did not apply to the multiple party case. *See* Bowling Machs., Inc. v. First Nat'l Bank, 283 F.2d 39 (1st Cir. 1960); Brandt v. Renfield Importers, Ltd., 269 F.2d 14 (8th Cir. 1959); Goldlawr, Inc. v. Heinman, 273 F.2d 729 (2d Cir. 1959); Meadows v. Greyhound Corp., 235 F.2d 233 (5th Cir. 1956); Hardy v. Banker's Life & Cas., 222 F.2d 827 (7th Cir. 1955).
54. The Advisory Committee on Rules said of the 1961 amendment:
> A serious difficulty has, however, arisen because the rule speaks of claims but nowhere mentions parties. A line of cases has developed in the circuits consistently holding the rule to be inapplicable to the dismissal, even with the requisite trial court determination, of one or more but less than all defendants jointly charged in an action, i.e., charged with

Rule 54(b) attempts to strike a balance between the policy against piecemeal appeals and the need to make immediate review available in multiple party or multiple claim situations at a time that best serves the needs of the litigants.[55] The court in *Aetna Insurance Co. v. Newton*,[56] explained the basic purpose of Rule 54(b):

> It [limitation on appellate courts to review only final judgments] is an authoritative application and implementation of a basic and persisting policy against piecemeal appeals .... Rule 54(b) attempts to make a reasonable accommodation between that policy and those problems of the timing of review which have been accentuated by the liberalized joinder of claims, counterclaims, cross-claims and third-party claims in one lawsuit, as permitted and encouraged by the present Rules of Civil Procedure .... [T]he draftsmen of this Rule [54(b)] have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power in the infrequent harsh case . . . .'[57]

The federal courts have made it clear that the strong historical policy against piecemeal appeals has been carried over to Rule 54(b), and that 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel.[58]

To obtain the certificate prescribed in Rule 54(b), in most cases a party will simply file a motion requesting the court to make the determination and direction required by the rule. The district court, however, may consider the question on its own motion.

Rule 54(b) requires the district court to make two separate decisions before an appeal may be taken from a final judgment as to one or more but fewer than all the claims or parties to a lawsuit. The court must make an "express direction for entry of judgment" and an "express determination that there is no just reason for de-

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> various forms of concerted or related wrongdoing or related liability. (citations omitted). For purposes of Rule 54(b) it was arguable that there were as many "claims" as there were parties defendant and that the rule in its present text applied where less than all of the parties were dismissed (citations omitted), but the Courts of Appeals are now committed to an opposite view. The danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases . . . and courts and commentators have urged that Rule 54(b) be changed to take in the former.

55. 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2654, at 33 (1973) [hereinafter cited as WRIGHT & MILLER].
56. 398 F.2d 729 (3d Cir. 1968).
57. *Id.* at 734.
58. *Id. See In re* Bromley-Health Modernization Comm., 448 F.2d 1271 (1st Cir. 1971); RePass v. Vreeland, 357 F.2d 801 (3d Cir. 1966); Thompson v. Trent Maritime Co., 343 F.2d 200 (3d Cir. 1965).

lay."[59] An express direction for the entry of judgment contemplates a finding that the case is one within the scope of Rule 54(b), *i.e.* the case must include either multiple claims,[60] multiple parties or both and at least one claim or the rights and liabilities of at least one party must be finally decided. If there are multiple parties, there need only be one claim in the action. All of the rights or liabilities of one or more of the parties regarding that claim must have been fully adjudicated. The district court cannot by a 54(b) certificate make final and appealable a ruling that is not final and appealable within the meaning of 28 U.S.C. § 1291 (1970).[61] The district court's express direction for the entry of judgment, therefore, is not conclusive as to the "finality" of its order, and the appellate court may dismiss an appeal even though the district court executed a 54(b) certificate.[62]

The second decision that the district court must make under Rule 54(b) is an express determination that there is no just reason for delay. By the exercise of its discretion,[63] in this respect, the district court has the power to release for appeal final decisions as to one or more but fewer than all of the multiple claims or multiple parties. There really is no precise test for determining whether there is a just reason for delay; the district court must consider any factors that are relevant. In *Campbell v. Westmoreland Farm, Inc.*,[64] the court stated, "[T]here must be some danger of hardship or injustice through delay which would be alleviated by immediate appeal."[65] It is clear therefore that the party de-

59. When a district makes both of the requisite findings, it is referred to as a "certification" that the particular judgment is ripe for review.
60. Whether a case involves multiple claims is a complex issue beyond the scope of this article. It is fully disclosed in 10 WRIGHT & MILLER, *supra* note 55, at § 2657.
61. 6 MOORE, *supra* note 4, at ¶ 54.30(1), at 443; Painton & Co. v. Bourns, Inc., 442 F.2d 216, 234 (2d Cir. 1971).
62. The question of whether a judgment is final is not discretionary and the appellate courts have broad reviewing power. 10 WRIGHT & MILLER, *supra* note 55, at § 2655, at 38 states:

> The failure of some appellate courts to recognize their broad reviewing power has resulted in some difficulties in analyzing the cases. The tendency of these courts to view the scope of their review as allowing the dismissal of an appeal only for an abuse of discretion when the propriety of the trial court's direction that a final judgment be entered under Rule 54(b) is called into question is unfortunate.

63. The determination respecting injustice through delay is discretionary with the district court. Contrast this with requirement of express direction for entry of judgment where the district court really has no discretion.
64. 403 F.2d 939 (2d Cir. 1968).
65. *Id.* at 942. Because the determination respecting delay is discretionary, the district court by this determination can strike the balance between

siring an immediate appeal must make some showing in order to overcome the normal rule that no appeal be heard until the entire case has been completed.

If an appellate court will be reviewing facts on an appeal pursuant to a Rule 54(b) certification that it may be forced to review again whether another appeal is brought after the district court renders its decision on the remaining claims or as to the remaining parties, Rule 54(b) certification should be withheld. In *Panichella v. Pennsylvania Railroad Co.*,[66] Panichella, a railroad employee, fell on a sidewalk abutting premises of Warner. Panichella sued the railroad, and the railroad impleaded Warner. Panichella moved for summary judgment against the railroad and the railroad moved for summary judgment against Panichella; both motions were based on a release Panichella had given to Warner. The motions were both decided against the railroad, and it desired an immediate appeal. The appellate court reversed the district court Rule 54(b) certification because the meaning and effect of the release might have to be decided a second time when the main suit was terminated.[67]

Additional considerations militating against certification are the policy against hearing appeals that require the appellate court to determine questions that are before the trial court with regard to other claims,[68] and the possibility that the need for review might be mooted by future developments in the district court.[69] An immediate appeal may have the effect of delaying the trial. In *Campbell v. Westmoreland Farms, Inc.*,[70] the appellate court re-

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the policy against piecemeal appeals and the need in a particular case for an immediate appeal even though the case still pends as to some claims or to some parties. Cases cited note 58 *supra*. *See* Schaefer v. First Nat'l Bank, 465 F.2d 234 (7th Cir. 1972); Panichella v. Pennsylvania R.R., 252 F.2d 452, 455 (3d Cir. 1958).

66. 252 F.2d 452 (3d Cir. 1958).

67. The *Panichella* court stated:

> [T]he legal effect of the release is in dispute between Panichella and the Railroad and also between the Railroad and Warner. Since Panichella is not a party to this appeal, no ruling as to the meaning or effect of the release which we might make now could or should become res judicata between the principal parties. The matter would have to be considered a second time. These considerations point to the desirability of a single appellate consideration of the effect of the release when all of the interested parties are before the court, rather than in the absence of one who is primarily concerned.

Id. at 455.

68. Zangardi v. Tobriner, 330 F.2d 224, 225 (D.C. Cir. 1964).

69. Thompson v. Trent Maritime Co., 343 F.2d 200 (3d Cir. 1965); Buresch v. American LaFrance, 290 F. Supp. 265 (W.D. Pa. 1968).

70. 403 F.2d 939 (3d Cir. 1968).

versed a district court Rule 54(b) certification where the immediate appeal would delay the trial without any counterveiling benefits. The court further indicated what some of those counterveiling benefits might be:

> This is not a case where immediate appeal "would eliminate much unnecessary evidence, confine the issues, shorten the trial, save much expense to the litigants in connection with the preparation for trial and contribute considerably to expediting the work of the [t]rial court."[71]

Presumably if an immediate appeal would produce some of these benefits, there truly would be no just reason for delay. In those cases certification should be allowed.[72]

VII. CONCLUSION

The ultimate conclusion and recommendation of this article is that Rule 54(b) should be adopted in Nebraska. Rule 54(b) is both certain and flexible. These virtues do not exist together in any one of the three alternative rules discussed above.

Perhaps the greatest argument in favor of Rule 54(b) is that from the parties' standpoint, the rule brings to the area much certainty. Under Rule 54(b), the parties to an action know when an order is or is not appealable. An appeal is not necessary, nor is one allowed, from an order adjudicating the rights and liabilities of one or more but fewer than all the parties to an action where the district court has not entered the certificate. Absent a certificate, the single judicial unit rule applies, and the order may not be appealed until all the issues as to all the parties are determined. In addition, Rule 54(b) significantly adds to the certainty of the correct procedure to follow because it is the trial judge who makes the decision as to finality and appealability. The parties no longer carry the burden of predicting whether some appellate court will later say that the liability of the parties is either identical or severable. The trial judge is the best person to make the determination. He is close to the case; he is familiar with the parties and issues involved. The trial judge can take into consideration any exigencies peculiar to a particular case which may militate either toward delaying an appeal or toward allowing an immediate appeal. The decision whether to issue the certificate is within the discretion of the trial court; however, the lower court's order may be reversed by a court of appeals for an abuse of discretion. Only in rare cases will the trial court's decision be reversed.

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71. *Id.* at 942.
72. *See* Hobart v. Sohio Petroleum Co., 255 F. Supp. 972 (D. Miss. 1965); Klebanoff v. Mutual Life Ins. Co., 246 F. Supp. 935 (D. Conn. 1965).

Both the single judicial unit rule and the Nebraska rule are certain. But, they provide certainty only by being arbitrary. Under Rule 54(b), the parties are sure of the correct procedure; and equally important the correct procedure in any given case is determined on the basis of the facts and circumstances peculiar to that particular case.

Flexibility is built into Rule 54(b) by allowing the trial court such broad discretion in determining whether to certify an order and allow an immediate appeal. The trial court will be faced with the same problem of balancing the policy against piecemeal appeals and the policy of avoiding unjust delay that the joint liability test attempts to accomplish. The joint liability test cannot successfully accomplish this accommodation of competing interests because its inquiry is limited in scope to the finding of the absence or presence of jointness. Rule 54(b) is unlimited in the scope of its inquiry. Any and all factors that may have a bearing on the question of appealability may be considered by the trial court.

Robert J. Banta '74